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No. 92-1053

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

Petitioner,

v.

RAN-DAV'S COUNTY KOSHER, INC., a New Jersey Corporation t/a COUNTY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as officers and shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,

Respondents,

and

STATE OF NEW JERSEY; PETER N. PERRETTI, JR; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LAMONACO; AND DOES 1-50,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF ON BEHALF OF RESPONDENTS, STATE OF NEW JERSEY, ET AL, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Establishment Clause prohibits New Jersey's Division of Consumer Affairs from enforcing the New Jersey Consumer Fraud Act and its implementing regulations against merchants who through material omissions or misrepresentations mislead consumers as to the preparation or content of food advertised as kosher?

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The State of New Jersey and its designated officials support the petition of the National Jewish Commission

on Law and Public Affairs requesting that a writ of certiorari issue to review that portion of the above-entitled judgment and opinion of the Supreme Court of New Jersey of July 22, 1992 which invalidated certain portions of the consumer fraud regulations governing the kosher-foods industry in New Jersey.

STATEMENT OF THE CASE

This facial challenge to kosher food regulations of the New Jersey Division of Consumer Affairs, promulgated under the authority of the State Consumer Fraud Act, was initiated following the commencement of an enforcement proceeding by the Attorney General of New Jersey alleging violations of the regulations and Act by two of the respondents before this Court, Ran-Dav's County Kosher, Inc., t/a County Kosher, a kosher butcher, and Arthur Weisman, its owner. While denominated as a facial challenge, the appellate record in this matter includes filings in the ultimately stayed enforcement proceeding as well as a multitude of secondary source material, largely irrelevant to the difficult constitutional issues posed.

The Division of Consumer Affairs in promulgating regulations governing the preparation and sale of kosher food adopted the Orthodox Jewish standard because that standard reflects the practices of the national kosher food industry, has been adopted by various courts and legislatures, and is recognized by all denominations of Jews in New Jersey as the commonly understood meaning of kosher. (Pet. App. A at 38a, 49a-52a; Pet. App. B at 72a,

75a). While the record contains information that acknowledges nominal differences between Orthodox and Conservative views of Jewish dietary laws, and indeed among Orthodox Jewish authorities themselves, (Pet. App. A at 6a, 20a-21a), "neither the record nor the secondary sources . . . establish that those disputes are so pervasive and substantial as to engender a dispute over religious doctrine in the routine enforcement actions contemplated by the regulations." (Pet. App. A at 48a; See also Pet. App. B at 72a, 82a-83a). As well, there is nothing in the record to indicate that New Jersey or the State of New York in its seventy-five year history of kosher enforcement has pursued any enforcement action where a religious dispute existed as to the requirements of kosher laws. (Pet. App. B at 79a). Indeed the unrefuted policy of the State is that where good faith differences exist as to a product, rather than impose religious restrictions, the State will accept those variations (Pet. App. B at 70a) but require conspicuous disclosure of the varying view in a commercial transaction (Respondent's brief in Supreme Court of New Jersey at 37-39).[1]

Central to the Consumer Fraud Act, *N.J.S.A.* 56:8-1 *et seq.*, and attendant regulations, *N.J.A.C.* 13:45A-21.1 *et seq.* (Pet. App. C at 95a-113a), is the disclosure of accurate information. The regulations require that food offered for sale as kosher comply with various display, identification,

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[1] The standard, as noted above, is sufficiently definite and objective to permit the State to seek limited injunctive relief requiring disclosure without resorting to religious determinations. The majority opinion holds that disclosure of the basis on which the characterization of kosher rests is "key" to a constitutional regulatory approach. (Pet. App. A at 29a).

and verification requirements (Pet. App. C at 98a-104a), in order that persons who choose to hold themselves out as purveyors of kosher food meet consumer expectations. The State's consumer protection policy is not concerned with the religious purity of kosher products, but merely requires consistency between the representation of the content and preparation of the product and the product itself in a commercial transaction.[2]

Where misrepresentations or omissions do occur, the Consumer Fraud Act reposes enforcement authority with the Attorney General of the State. *N.J.S.A.* 56:8-3, 56:8-8. Neither the regulatory scheme reviewed here nor the record demonstrates any deviation from that practice. The regulations do not confer on religious persons or bodies any authority to interpret or enforce the law. The regulations make no reference to any religious body, nor is religious training a requirement for the position of Bureau Chief or for the positions of inspectors.[3] Finally, adjudication of all the complaints initiated under the regulations rests with the courts or the Director of the Division of Consumer Affairs.

As discussed more fully in the petition, the Superior Court of New Jersey, Appellate Division in a 2-1 vote upheld the validity of the regulations against a variety of federal and state constitutional challenges (Brief of Pet. at 7-8; Pet. App. B at 85). By reason of the dissenting judge's

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[2] For example, the regulations do not require that there be rabbinical supervision of establishments selling kosher food.

[3] The record reveals that a former bureau chief was not a rabbi or an observant Jew, and one of the inspectors was not Jewish. (Pet. App. A at 46a).

opinion on the Establishment Clause challenge, this issue alone came before the Supreme Court of New Jersey as a matter of right. *N.J. Ct. R.* 2:2-1. By a vote of 4-3 the Supreme Court of New Jersey reversed, invalidating as violative of the Establishment Clauses of the federal and state constitutions those portions of the regulations, which in its view "impose substantive religious standards for the actual preparation and maintenance of kosher food." (Pet. App. A at 30a).[4]

The Supreme Court remanded to the Division of Consumer Affairs for the expeditious reformulation of the regulations consistent with its opinion. Pursuant to that directive Division staff is completing the draft regulations and anticipates publishing the proposed regulations shortly.

REASONS FOR GRANTING THE WRIT

As the majority opinion of the Supreme Court of New Jersey recognizes and the split of opinion at both state appellate levels confirms, the Establishment Clause challenge posed by the facial attack upon New Jersey's kosher food regulations presents a "difficult and unusual issue." (Pet. App. A at 4a). While the majority of the Supreme Court of New Jersey finds confirmation of its views in the opinions of this Court, most notably in

[4] The State respondents concur in the analysis set forth in the petition at pages 11-12 that the majority's ruling does not rest on an adequate and independent state ground under the analysis set forth in *Michigan v. Long*, 463 *U.S.* 1032, 1037-44 (1983).

Larkin v. Grendel's Den, Inc., 459 *U.S.* 116 (1982) (Pet. App. A at 14a-19a, 26a) and *School District of Grand Rapids v. Ball*, 473 *U.S.* 373 (1985) (Pet. App. A at 25a-26a), the dissenting opinion of that Court points to the conceptual difficulties in extending these decisions to the New Jersey kosher fraud enforcement scheme. Thus, whereas the majority finds that the State's reference to largely undisputed standards for kosher food preparation "inextricably intertwine[s] . . . the secular law of the State" with religious law (Pet. App. A at 15a), thereby fostering excessive governmental entanglement with religion, the dissenting state justices' review of the record lead them to conclude that the regulations' reference to the Orthodox Jewish standard simply recognizes a well-developed and widely accepted industry practice. As such, they conclude "the regulations do not require the State to make religious determinations[,]" but to enforce regulations "referring only to objective and therefore, secular criteria." (Pet. App. A at 34a). The dissenting justices find support for this conclusion in the opinion of this Court in *Hygrade Provision Co. v. Sherman*, 266 *U.S.* 497 (1925). There, in rejecting a vagueness challenge to New York's criminal kosher food fraud statute, this Court held that the term kosher "has a meaning well enough defined to enable one engaged in the trade to correctly apply it; at least as a general thing." 266 *U.S.* at 502.

Similarly, the majority concludes that the creation of an Advisory Committee of rabbis to "advise the Attorney General on Kosher matters and enforcement of the New Jersey Kosher regulations . . . and make recommendations for regulatory changes" and the appointment of an

ordained Orthodox Jewish rabbi as the Chief of the Bureau responsible for the investigation of fraud in the kosher food industry creates an entanglement between religion and state "even more apparent" than in *Larkin v. Grendel's Den, supra.* (Pet. App. A. at 19a). The dissenting opinion distinguishes *Grendel's Den,* finding that there final governmental decisionmaking authority was effectively ceded to private, sectarian bodies. In this matter, in the dissenting justices' view, neither the regulations nor the Executive Directive creating the Advisory Committee delegate to the Committee the power to direct or veto a decision of the Bureau. (Pet. App. A. at 47a). The dissent similarly notes the absence of any requirement in the regulations or any record evidence of an administrative policy requiring that either the Bureau Chief or kosher fraud inspectors be rabbis or even Jewish. (Pet. App. A at 46a).

The conflicting interpretations of this Court's establishment of religion precedent is revealed as well in the majority and dissenting justices' analysis of the "effects" prong of the *Lemon v. Kurtzman,* 403 *U.S.* 602, 612-613 (1971) test. In the view of the majority, the State, by adopting a standard emanating from religious doctrine and permitting religiously trained individuals to participate in the administration of its enforcement scheme, necessarily advances the religious tenets of Orthodox Jewish law and "foster[s] a close identification of its powers and responsibilities with those of a[] . . . religious denomination." (Pet. App. A. at 25a, quoting from *School District of Grand Rapids v. Ball, supra,* 473 *U.S.* at 389). Contrastingly, the dissenting justices point to the commands of *Grand Rapids* and *Allegheny County v. ACLU,* 492

U.S. 573, 595-598 (1989) that reviewing courts look to the context of the religious reference in determining whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." (Pet. App. A at 44a, quoting from *Allegheny County v. ACLU, supra,* 492 *U.S.* at 597, in turn quoting from *School District of Grand Rapids v. Ball, supra,* 473 *U.S.* at 390). Applying that standard, the dissenting opinion finds the public unlikely to perceive the State's consumer fraud efforts as

> endorsing Orthodox Judaism or as disapproving other religious choices. Enforcement does not encourage consumers to purchase kosher food, nor does it encourage merchants to sell kosher food. Further, because the regulations on their face authorize factual inquiries in order objectively to apply non-disputed kosher principles, the State is not forcing compliance with a particular religious interpretation; rather, it enforces unitary standards that do not favor a particular religion or religious sect. [Pet. App. A. at 45a].

The dissenting opinion also highlights the thorny issue of whether the majority correctly invalidated the regulations in the context of a facial challenge on the record presented to the court. As the dissent notes in citing to several of this Court's rulings in establishment of religion challenges, "[i]t has not been the Court's practice, in considering facial challenges to statutes . . . to strike them down in anticipation that particular applications may [produce unconstitutional results]." *Roemer v. Board of Public Works,* 425 *U.S.* 736, 761 (1976), cited with approval in *Bowen v. Kendrick,* 487 *U.S.* 589, 601 (1988).

(Pet. App. A at 39a). Thus, in Establishment Clause challenges the Court has required that the challenger demonstrate that the constitution is necessarily violated every time the law is enforced. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 *U.S.* 756, 779-80 (1973). In this matter, the dissenting opinion notes that the only applications of the regulations brought to the court's attention – the underlying state enforcement action – failed to establish a likely dispute as to religious doctrine. (see Pet. App. A at 53a to 54a; Pet. App. B at 68a). See also Pet. App. A at 48a to 49a.[5]

While the Supreme Court of New Jersey has allowed for some form of continued regulation of fraud in the kosher food industry (Pet. App. A at 29a to 30a), it is likely that Establishment Clause challenges will continue to be mounted based upon the majority's broad reading of the "effects" prong of the *Lemon v. Kurtzman* test. In this regard the Court's disposition of the pending *Zobrest v. Catalina Foothills School District*, No. 92-94 docket, will provide further clarification as to the "primary effect advancing religion test" of *Lemon* and correspondingly, the "symbolic union of government and religion" analysis of *School District of Grand Rapids v. Ball, supra*, 473 *U.S.* at 389, relied upon by both the Supreme Court of New Jersey and the Ninth Circuit Court of Appeals in *Zobrest v. Catalina Foothills School District*, 963 F.2d. 1190, 1194 (9th Cir.) pet. for cert. gr. 61 *U.S.L.W.* 3256 (October 5, 1992).

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[5] New York's 75-year enforcement history reveals a similar absence of religious dispute. (Pet. App. B at 85a).

As the petitioner has urged, even if the Court were not presently inclined to grant a writ of certiorari to review the ruling below, it would be appropriate to retain this case on the docket to await the disposition of *Zobrest*. That result will afford the State of New Jersey and other jurisdictions which vigorously enforce their consumer fraud laws on behalf of consumers of kosher food the necessary guidance to insure continued conformity with First Amendment requirements.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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